

REHEARING JAN 15 2007



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BEFORE THE ARIZONA CORPORATION C

COMMISSIONERS

JEFF HATCH-MILLER, Chairman
WILLIAM A. MUNDELL
MIKE GLEASON
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BARRY WONG

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Arizona Corporation Commission

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In the Matter of the Application of Picacho
Water Company for an Extension of its
Certificate of Convenience and Necessity
in the City of Eloy in Pinal County

DOCKET NO. W-03528A-06-0313

In the Matter of the Application of Picacho
Sewer Company for a Approval to Extend
its Sewer Certificate of Convenience and
Necessity to Additional Portions of Robson
Ranch and EJR Ranch in Pinal County

DOCKET NO. SW-03709A-06-0314

**APPLICATION OF PICACHO
WATER COMPANY AND
PICACHO SEWER COMPANY
FOR REHEARING AND
RECONSIDERATION OF DECISION
69174, AND ALTERNATIVELY,
REQUEST FOR RESUMPTION OF
EVIDENTIARY HEARING**

Picacho Water Company and Picacho Sewer Company (collectively, "Picacho" or the "Company"), through undersigned counsel, and pursuant to A.R.S. §40-253 and A.A.C. R14-3-111, hereby submit their Application for Rehearing and Reconsideration of Decision 69174 issued December 5, 2006 and request that the Arizona Corporation Commission ("Commission") modify Decision 69174 to delete the condition in the Ordering section (starting at page 9, line 26 and continuing to page 10, line 2) prohibiting the sale of groundwater for irrigation¹ of future golf courses or for ornamental lakes and water features within the certificated expansion areas. Alternatively, Picacho requests that the Commission resume the evidentiary hearing in this docket to receive evidence on the limited issue of the necessity and effect of the condition as it relates to the impact of groundwater usage on the aquifer given (a) the

¹ It should be noted that under the Groundwater Code the term "irrigation" is defined as being watering for the purposes of growing crops; therefore, the watering of a golf course would not be considered irrigation but rather a "non-irrigation" use of groundwater. See A.R.S. § 45-402(18) (defining the term "irrigate" as used in groundwater regulation).

relationship of the Condition to traditional drought measures, (b) the status of the property in question as "member lands" in the Central Arizona Groundwater Replenishment District ("CAGRD"), (c) the location of the property within the Pinal Active Management Area ("AMA") and the resulting regulation of the amount of water that may be used on such courses or water features; and (d) the availability of effluent for golf course or water feature use. Moreover, because A.R.S. § 40-253 requires the Commission to grant this Application within twenty days or it is deemed denied by operation of law, the Company requests that the Commission consider this Application at its next Open Meeting, currently scheduled for January 9, 2007. In support hereof, Picacho states as follows:

I. INTRODUCTION

On December 5, 2006, the Commission issued Decision 69174 approving an extension of the Certificates of Convenience and Necessity ("CC&N") for Picacho. Finding of Fact ("FOF") 32 and the corresponding seventh Ordering paragraph of the Decision state, respectively, as follows:

32. In recent months, the Commission has become increasingly concerned about the prolonged drought in Central Arizona. Therefore, we believe Picacho Water and Picacho Sewer should be required to conserve groundwater and that Picacho Water should be prohibited from selling groundwater for the purpose of irrigating any future golf courses within the certificated expansion areas or any ornamental lakes or water features located in the common area of the proposed new developments within the certificated expansion area.²

* * *

IT IS FURTHER ORDERED that in light of the on-going drought conditions in central Arizona and the need to conserve groundwater, Picacho Water Company [and] Picacho Sewer Company are prohibited from selling groundwater for the purpose of irrigating any future golf courses within the certificated expansion areas or any ornamental lakes or water features located in the common areas of the proposed new developments within the certificated expansion areas.³

Prior to the issuance of the Decision, the Administrative Law Judge ("ALJ")

² Decision 69174 at 7, lines 11-16.

³ Decision at 9, line 26 to 10, line 2.

1 issued a Recommended Opinion and Order ("ROO") which contained the above-
2 referenced FOF and Ordering paragraph (hereinafter collectively referred to as the
3 "Condition"). Pursuant to A.A.C. R14-3-110.B, Picacho filed exceptions dated
4 November 16, 2006, (the "Exceptions") opposing the Condition. The Exceptions, which
5 Picacho hereby incorporates by reference, contained the following six reasons why the
6 Condition should have been deleted from the final Decision:

- 7 • The Condition is unnecessary;
- 8 • The Condition is outside the proper analysis of a CC&N extension;
- 9 • The use of groundwater in Pinal County has already been addressed
10 (regulated) by the Arizona Department of Water Resources;
- 11 • The short-term use of groundwater in the initial irrigation of a golf course
12 bridges the gap in time from the first home sales in a community until
13 sufficient homes are sold to generate an effluent supply for the golf course;
- 14 • The Robson model is to maximize the efficient use of effluent in Robson
15 communities and minimize the impact of development on groundwater
supplies; and
- 16 • Picacho is legally required to supply water to its customers.

17 At the Commission's November 21, 2006 Open Meeting, the ROO and the
18 Company's Exceptions were discussed by the Commission. Additionally, the
19 Commission discussed an Amendment offered by one of the Commissioners which
20 would have removed the Condition from the final Decision. Picacho's representative
21 and its legal counsel answered questions from the Commissioners relating to the
22 Exceptions and stated their support for the proposed Amendment because the Condition
23 is unnecessary, inappropriate and not supported by the evidence presented at the October
24 6, 2006, evidentiary hearing. Picacho further noted that the Condition was not included
25 in the Staff Report and, therefore, the Company had not been given notice and an
26 opportunity to present evidence on the proposed Condition. Had Picacho known the
27 Commission was going to impose the Condition, it would have argued against the
28 Condition and presented evidence at the hearing to demonstrate why the Condition is
unnecessary and inappropriate in the instant case.

During the Open Meeting discussion, Commissioner Mundell asked Picacho if it wanted the matter send back to the Hearing Division for a further evidentiary hearing to allow the Company to present evidence. Based upon the language in the ROO tying the Condition to the Commission's concern about a drought in Central Arizona, and the fact that the discussion at the Open Meeting focused on the drought, Picacho interpreted the Commission's offer to remand the case as focusing on whether or not a drought actually exists, as opposed to (i) the impact of golf course irrigation, ornamental lakes and water features on groundwater resources in Pinal County and (ii) whether the Condition was necessary and appropriate given the fact that the lands involved are enrolled in the Central Arizona Groundwater Replenishment District ("CAGRD") and subject to replenishment requirements (as discussed below). Additionally, Picacho believed that if the Commission wanted to institute new policy, it should have raised the issue at the evidentiary hearing or defer implementation of such policy to a generic proceeding in the future, as opposed to arbitrarily applying it to a 160 acre CC&N extension request. Consequently, the Company did not take up the offer to remand, the Amendment failed by one vote, and the Commission approved the ROO as filed.

For the reasons set forth herein, Picacho requests that the Commission grant this Application for Rehearing and Reconsideration and delete the Condition from Decision 69174. Alternatively, if the Commission is not disposed to grant Picacho's request, the Company requests that the Commission remand the case to the Hearing Division for an additional evidentiary hearing on the limited issue of the necessity and effect of the condition as it relates to the impact of groundwater usage on the aquifer given the legal requirement within the Pinal AMA to replenish pumped groundwater with renewable supplies.

II. ARGUMENT

A. The Condition is unnecessary, not supported by the evidence, and a denial of due process.

1. The Condition is unnecessary. Picacho's requested CC&N extension area in this case is only 160 acres out of the 3,000-acre master planned Robson Ranch being developed by Robson Communities. The requested CC&N extension area includes no golf course (or any portion thereof), no ornamental lakes and no water features in any common areas. This information was set forth in the Staff Report.⁴ Further, there was no evidence presented at the hearing to suggest that groundwater would be used within the requested CC&N extension area to water a golf course or for ornamental lakes or water features. Staff made no recommendation in its Staff Report or at the hearing regarding any prohibition on the use of groundwater as contained in the Condition. Based upon the evidence presented at the hearing, the ALJ appropriately included FOF 31 on page 7 of the ROO, which states:

According to Staff's Report, Picacho Sewer has stated there are no artificial lakes, golf courses, ornamental structures or other aesthetic water features planned for the extension area and that open spaces will be watered with groundwater in accordance with state law. Staff further stated that Picacho Sewer plans to use effluent to water the golf course in the existing CC&N area, beginning in the Fall 2006 when it is expected that development will reach 100 homes. Additionally, the pipes for the effluent are already in place and any excess effluent will be sent to recharge basins and recharge wells.

In light of FOF 31, which is supported by the evidence presented in this case, the Condition is neither relevant nor necessary. Thus, Picacho requests that Decision 69174 be amended to delete the Condition.

2. If the Commission wanted to adopt new policy through a Condition, it should have been raised prior to the evidentiary hearing.

Although the Commission implements its public interest policies through its

⁴ According to Picacho's July 14, 2006 response to Staff's insufficiency letter, "there are no artificial lakes, golf courses, ornamental structures or other aesthetic water features planned for the extension areas. Open spaces in the proposed extension area will be watered with groundwater in accordance with state law. (Staff Report dated September 1, 2006 at 3.)

1 decisions, orders and rules, it must first notice and raise such policy concerns with the
2 entities that it regulates. Traditionally, this occurs through a generic workshop, generic
3 docket and or rulemaking proceeding. On occasion, the Commission identifies issues
4 during the course of its evaluation of an application that results in a recommendation that
5 has public policy implications that are sometimes carried into other proceedings.
6 However, in all instances, to the extent that the Commission wants to impose a condition
7 on an applicant, it must first raise the issue with the applicant prior to the hearing in
8 either a recommendation in a staff report, pre-filed testimony or a procedural order
9 which affords the applicant the opportunity to challenge the need and necessity under the
10 circumstances. In the instant case, as the issue was not raised by the Commission prior
11 to the close of evidence, the Commission should not impose the Condition until such
12 time that it has received evidence through a generic docket or other evidentiary
13 proceeding.

14 3. *The Condition is not supported by any evidence and its*
15 *imposition without notice and an opportunity for hearing is a*
16 *denial of due process.*

17 Commission determinations must be supported by substantial evidence. *See,*
18 *Grand Canyon Trust v. Arizona Corporation Commission*, 210 Ariz. 30, 34 (Ariz. Ct
19 App. 2005), *Tucson Electric Power Company v. Arizona Corporation Commission*, 132
20 Ariz. 240, 243; (1982), *Arizona Corporation Commission v. Citizens Utilities Company*,
21 120 Ariz. 184, 187 (1978). In this case, the sole stated justification for including the
22 Condition is a concern about “the prolonged drought in Central Arizona” as set forth in
23 FOF 32. However, there was no evidence presented at the hearing or filed in the docket
24 which addressed the drought. If Picacho had been given notice that the effect of a
25 drought on groundwater supplies was an issue in this case — potentially leading to the
26 adoption of the Condition — then the Company would have put on evidence specifically
27 addressing the issue. However, Picacho never got that opportunity because the
28 Commission never raised the issue until the ROO was issued.

Picacho does not know whether a prolonged drought exists in Central Arizona,

1 and the Company does not intend to dispute the matter with the Commission. Rather,
2 the Company submits that the *relevant* issue is whether the Condition is an appropriate
3 response to a drought condition. The Company is also prepared to present evidence that
4 the Condition will have unintended negative consequences. Picacho has not had an
5 opportunity to present any of this evidence and believes that the imposition of a “one
6 size fits all” condition without notice and opportunity for hearing is a substantive denial
7 of its due process rights under the U.S. and Arizona Constitutions. Accordingly, the
8 Company requests that the Commission delete the Condition or remand the narrow issue
9 of the Condition to the Hearing Division for an additional evidentiary hearing.

10 B. The Condition is an improper restriction relating to the granting of a
11 CC&N.

12 There are only two questions the Commission must answer in the affirmative
13 before granting a new CC&N or extending an existing CC&N. First, is there a
14 demonstrated “need and necessity” for the proposed utility service. Second, is the
15 applicant “fit and proper” to hold a CC&N. Conclusion of Law (“COL”) 4 on page 8 of
16 Decision 69174 answers the first question in the affirmative: “[t]here is a need and
17 necessity for water and wastewater service in the proposed service territory as set forth
18 in Exhibit A.” COL 5 on page 8 of Decision 69174 answers the second question in the
19 affirmative: “[s]ubject to compliance with the above-stated conditions, Picacho Water
20 and Picacho Sewer are fit and proper entities to receive extensions of their water and
21 wastewater Certificates, for the proposed extension area in Pinal County, as set forth in
22 Exhibit A.”

23 The Commission often attaches conditions to its decisions approving CC&Ns or
24 extensions pertaining to the need and necessity for service and/or the fitness of the
25 applicant. For example, in Decision 69174, the Commission attached conditions
26 requiring that Picacho (i) charge its customers the Commission authorized rates and
27 charges, (ii) file its ADEQ approval to construct, (iii) file a copy of the developer’s
28 Certificate of Assured Water Supply, (iv) file a copy of the Pinal County franchise

1 agreement, and (v) file an affidavit with its annual report attesting that Picacho is current
2 on paying its Arizona property taxes. So long as Picacho complies with these conditions
3 as set forth in an adopted final decision, there is a need and necessity for service and
4 Picacho is fit and proper to provide that service. Failure to comply with the conditions
5 of a final decision could subject Picacho to actions by the Commission including
6 sanctions or even the loss of its CC&N. All of these conditions support the public
7 interest, and the Commission is constitutionally and statutorily empowered to ensure as
8 much.

9 However, imposition of the Condition in Decision 69174 is outside the scope of
10 “need and necessity” or “fitness.” While Picacho appreciates the concern about the
11 potential effect of a drought on the groundwater supply, the Company submits that this is
12 a public policy determination which does not relate to whether Picacho has demonstrated
13 a “need and necessity” for the service or that the Company is “fit and proper.”⁵
14 Hypothetically, if Picacho failed to charge the Commission approved rates and charges
15 or failed to obtain its ADEQ Approval to Construct or its ADWR Certificate of Assured
16 Water Supply, an argument could be made that the Company is not “fit and proper” to
17 continue to hold the CC&N. However, if the Company lawfully supplies water as
18 required pursuant to its CC&N to a future customer (such as a business or homeowners
19 association) which uses the water for a water feature⁶, then pursuant to Decision 69174,
20 the Company is potentially subject to a finding that it is not “fit and proper” and the
21 Company’s CC&N could be subject to revocation. Moreover, it puts the Company in a
22 position of “policing” its customers and its refusal to supply requested water service for
23 a lawful purpose could result in a complaint action against the Company by a customer.
24 The Company should not be put in a position of having to defend itself for supplying
25

26 ⁵ See the discussion and analysis in the Exceptions relating to Docket No. SW-0345A-00-1043 (Citizens
27 Water Services Company) and the Commission imposing a CC&N condition “in an isolated way,
28 separate and apart from its effects upon the utility or its service.”

⁶ It should be noted that the Condition uses the term “water feature” without referencing any applicable
definition.

1 water which may legally be used by its customers. Finally, although there was a
2 suggestion by one of the Commissioners at the Open Meeting that the Company could
3 simply file a request for a waiver of the Condition, this would be a disservice to the
4 customer. The customer has a lawful right to purchase water from the Company and the
5 Condition impedes the Company's ability to meet the needs of its Customer and makes
6 the Company appear unresponsive to such needs. Also, there is no assurance that a
7 waiver request would be granted and given the time it takes to go through such a process
8 at the Commission, it would delay the customer for potentially many months and put
9 additional demands on Staff. Each of these scenarios would result in the Company
10 unfairly having to spend money and would otherwise impede the customer in order to
11 facilitate the Commission's public policy concerns. These are not unrealistic scenarios
12 and demonstrate potential unintended consequences of this Condition.

13 C. The Condition is essentially a prohibition on particular types of water
14 uses and is not substantively a drought-related condition.

15 1. The condition is not consistent with generally recognized
16 approaches to drought-related regulatory requirements.

17 Generally, drought-related regulations are intended to be flexible and responsive to
18 specific water uses and stages of water resources availability conditions, and are not blanket
19 prohibitions on types of water uses. See Governor's Drought Task Force, Arizona Drought
20 Preparedness Plan, "Operational Drought Plan", dated October 8, 2004, pp. ii-vi (outlining
21 guidelines for drought response and mitigation based on a staged assessment of drought
22 conditions and specified responses for each stage). Drought-related regulation, generally,
23 recognizes that drought phenomenon is typically periodic in nature and uncertain in duration.
24 For this reason, regulatory responses to drought conditions generally target non-essential water
25 uses and specify actions to be taken based on the level of crisis. For example, the Governor's
26 Task Force indicated that in the event "extreme" drought is declared, i.e. the highest stage of
27 drought, the appropriate response would be to require prohibitions on all outdoor watering,
28 residential car washing, water use in fountains, refilling of residential pools, and set allowances
on golf course winter seeding. See Governor's Drought Task Force, Arizona Drought

Preparedness Plan, "Operational Drought Plan", dated October 8, 2004 at p. vi. By comparison, the Condition does not assess the nature of any drought-related crisis, it simply targets and prohibits certain types of water use, i.e., groundwater to be used for golf courses, lakes and water features within new developments. Substantively, this Condition is not a drought measure as it is not designed to evaluate and respond to specific drought conditions, available supplies, or other water management needs. Rather, the objective of the Condition operates as a ban on specific types of water uses. Such a ban is not reasonably related to the Commission's authority to regulate water utilities.

2. The Condition is not drought-related because it targets a type of water use that historically has not been as susceptible to drought circumstances as other types of water supplies, such as surface water, which are not prohibited by the Condition.

Another indication that the Condition is not drought-related is the fact that the type of water supply targeted by the Condition is one which is historically not as vulnerable to the impact of drought as other water supplies which would be allowable under the Condition. Specifically, drought, which is defined as "a prolonged period with little or no rain," is a condition which logically first impacts the availability of surface water supplies, which are immediately dependent on precipitation. See Webster's II New College Dictionary (1999), p. 347. However, the Condition does not prohibit the use of surface water supplies, such as Central Arizona Project ("CAP") water⁷, for meeting the needs of golf courses, lakes, or water features within new developments.

Historically, groundwater supplies are less susceptible to fluctuations in annual precipitation as large amounts of groundwater can be feasibly stored within underground aquifers. For example, ADWR has estimated that approximately 34 million acre-feet of groundwater is likely to be in storage within the Pinal AMA in the first 1,200 feet below land surface ("BLS").⁸ See "Third Management Plan for the Pinal Active Management Plan, 2000-

⁷ Although CAP water is a supply which is "imported" into the Pinal AMA, CAP water is a surface water supply which would be subject to regional drought phenomenon, assuming a drought was in effect.

⁸ To provide some useful perspective, the December 13, 1999, Third Management Plan for the Phoenix Active Management Area reported that there were 129 golf courses within the Phoenix AMA at that time. See Third Management Plan for the Phoenix Active Management Plan, 2000-2010," Arizona

2010,” Arizona Department of Water Resources (December 1999) (“TMP for Pinal AMA”) Chapter 2, page 4. The 1,200-foot BLS line is a regulatory line, and there is additional stored groundwater below 1200-feet BLS.

Groundwater, historically, has been viewed as a resource that is readily available, particularly when supplies of surface water are limited because of drought conditions. This ability to rely on groundwater supplies as a “back-up” to fluctuations in surface water supplies is also expressed in various water management strategies and policies adopted by the Arizona Department of Water Resources (“ADWR”). For example, generally, ADWR’s Assured Water Supply Rules require that water demands met with surface water supplies such as CAP water or Colorado River supplies, also demonstrate “backup” supplies, which could be utilized in the event of a shortage in surface water. *See* A.A.C. R-12-15-716(F) and (G) (requiring backup supplies for CAP water and Colorado River water). A logical, “back-up” supply for surface water is proven groundwater supplies, as they are not vulnerable to seasonal shortage. This policy is also expressed in other AWS regulations such as the “drought exemption” where by ADWR could allow groundwater pumping without replenishment⁹ in times of drought. *See* A.A.C. R12-15-722(E)(1) (recognizing the ability to use groundwater pumping in response to shortage in surface water supplies because of drought conditions without requiring replenishment).

The fact that the Condition targets only groundwater supplies, and not surface water, suggests that the purpose of the Condition is not to address drought concerns, but rather an inappropriate ban of groundwater use for certain types of uses.

Department of Water Resources (December 1999) (“TMP for the Phoenix AMA”) Table 6.1 at page 6-17. Assuming that each golf course used an average of 400 acre-feet of water per annum, and that all water used was groundwater (which is not the case), the total annual demand would be 51,600 acre-feet, or approximately .0015% of the 34 million acre-feet of stored groundwater in the Pinal AMA. By way of comparison, the TMP for the Pinal AMA reported that there were only 21 turf facilities of 10 acres or greater (including golf courses). TMP for the Pinal AMA at page 6-13. Thus, the amount of groundwater used for golf courses within the Pinal AMA is truly de minimus.

⁹ *See* discussion below explaining the concept of state law based groundwater replenishment requirements.

- 1 3. The practical effect of the Condition will not be a measured
2 response to drought, but rather a permanent ban on the
3 construction of residential developments with golf courses — an
4 impact clearly outside the scope of the Commission's authority.

5 When the prohibition against groundwater use for golf courses and lakes is examined in
6 the context of existing state law requirements in ADWR's Assured Water Supply Program, one
7 of the major consequences of the condition could be a permanent ban on the construction of new
8 residential developments with golf course features, such as the type of master-planned
9 communities built by Robson Communities — a result clearly beyond the scope of the
10 Commission's authority to regulate water utilities.

11 Under ADWR's Assured Water Supply Program, all new subdivisions, including
12 Robson Communities' developments, are required to demonstrate a 100-year assured water
13 supply to ADWR before the subdivision plat can be approved by a platting entity or public
14 reports for the sale of lots can be issued by the Arizona Department of Real Estate. *See* A.R.S.
15 § 45-576. One method of demonstrating an AWS is to obtain a certificate of assured water
16 supply from ADWR. *Id.* As part of its review, ADWR requires that sufficient water supplies be
17 proven to meet the full 100-year demands of the subdivision, including any related features —
18 such as golf courses. This means that in order to issue a certificate of AWS for a subdivision
19 ADWR will require a developer, like Robson Communities, to show that there is a 100-year
20 assured water supply for the golf course, in addition to the subdivision lots and common areas.

21 Robson Communities is a developer of active adult oriented residential developments
22 where a golf course is an amenity specifically desired and sought out by Robson Communities'
23 customer base, adult homebuyers. It has been Robson Communities' experience that home
24 buyers want amenities to be constructed *before* buying a home, so that the nature and quality of
25 the community can be assessed before purchasing the home. The condition prohibits the use of
26 groundwater on golf courses; therefore, it is likely that ADWR could view groundwater as a
27 type of supply that is not legally available to meet the golf course water needs. Although golf
28 courses within Robson Communities' developments are generally designed to utilize effluent
supplies long-term—effluent which is generated by the residential customers within the

1 development is not immediately available at the time the golf course is constructed—i.e. *before*
2 home sales are made. Therefore, effluent generated by the development cannot be the initial
3 water supply to meet the needs of the golf course as part of a demonstration of AWS.

4 Finally, as discussed above, the Condition arguably could allow for the use of CAP
5 water for purposes of constructing a golf course, which can be purchased on an “as available” or
6 “excess” supply basis annually from the Central Arizona Water Conservation District
7 (“CAWCD”). However, when reviewing applications for certificates of AWS, ADWR does not
8 view non-reliable or transient supplies such as “excess” CAP water as meeting the strict
9 standards of a 100-year assured water supply, and therefore, generally ADWR does not
10 recognize such supplies in the AWS process. *See, generally*, ADWR’s AWS Rules at A.A.C.
11 12-15-701, *et seq.* Thus, while the use of CAP water would be allowable under the
12 Commission’s Condition, it is not recognized by ADWR and therefore is not a viable alternative
13 for golf course developments which must comply with ADWR’s AWS requirements.

14 Because of this interplay between the requirements of ADWR’s AWS program and the
15 Commission’s Condition, a likely consequence of the prohibition on groundwater use for golf
16 courses is a permanent ban on developments that rely on golf course amenities. This interplay
17 in the regulations singles out and effects golf courses associated with residential developments
18 and does not impact golf courses not associated with residential developments, which can use
19 “excess” CAP water supplies because they do not have to demonstrate a 100-year AWS.
20 Moreover, it should be noted that because the Condition singles out golf course watering and
21 lakes (often associated with golf courses), it disproportionately affects only developers of golf-
22 related developments, like those constructed by Robson Communities, and not other types of
23 residential developments that include other types of water intensive amenities such as parks,
24 school fields and playgrounds, soccer fields and large turfing or open spaces, often called “green
25 belts.” Clearly, a prohibition on golf course developments is a consequence of the Condition
26 that is beyond the Commission’s authority to regulate water companies.

1 D. The Condition is arbitrary and capricious because it does not distinguish
2 between: (1) the use of groundwater that is replenished and groundwater
3 that is not, and (2) golf courses that are constructed within AMAs versus
4 those outside of AMAs.

5 1. There is no water management basis for prohibiting groundwater
6 use subject to replenishment on golf courses and lakes, when the
7 water resource implications on groundwater and CAP supplies
8 are essentially the same as when a golf course or lake is
9 constructed with CAP water.

10 As discussed above, the Condition would allow golf courses to be watered with “excess”
11 CAP water. However, from the water management perspective there is no meaningful
12 difference between a golf course watered with CAP supplies and a golf course watered with
13 groundwater that is subject to replenishment requirements.

14 Pursuant to the state’s AWS Program new subdivisions must obtain a certificate of AWS
15 from ADWR. One of the substantive requirements for demonstrating an AWS, for subdivisions
16 located within an AMA, is a showing that any proposed use of groundwater for the development
17 is consistent with the water management goal of the AMA. See A.R.S. § 45-576. One way of
18 making this demonstration is to enroll subdivision lands within the Central Arizona
19 Groundwater Replenishment District (“CAGRDR”), a branch of CAWCD. See A.R.S. § 45-
20 576.01. Generally, enrollment in the CAGRDR means any excess groundwater used at new
21 developments will be replenished via artificial recharge of surface water into underground
22 aquifers within the AMA by the CAGRDR. *Id.* Thus, the CAGRDR is a statutory mechanism to
23 essentially make groundwater supplies into “renewable” supplies for AWS purposes. Generally,
24 “excess” CAP water is a major type of water supply that is used by CAGRDR for replenishing
25 groundwater used by enrolled lands. See “Central Arizona Groundwater Replenishment District
26 Plan of Operation” dated November 8, 2004, pp. 42-45. Therefore, when lands underlying a
27 golf course are enrolled in the CAGRDR, ultimately CAP water, or another type of renewable
28 supply, will be used to offset groundwater supplies used by the golf course.

Because Robson Ranch is located within the Pinal AMA, and the land has been enrolled
in the CAGRDR, if a golf course were constructed at the development, any excess groundwater
supplied by the Company to the golf course (or, for that matter, any excess groundwater

supplied to any other large users) would be subject to the regulations of both the AWS Program and the CAGRD. As such, there is no meaningful water management difference between a golf course built outside of a residential development with the use of CAP supplies and a golf course within a residential development, such as a typical Robson Communities' development, where initially a golf course is constructed with groundwater which is ultimately subject to replenishment requirements. This is because the net impact on the groundwater supplies in the aquifers as well as CAP supplies is the same under both circumstances.¹⁰

Inasmuch as the Condition allows for use of CAP water for golf courses but not replenished groundwater, the Condition is arbitrary and capricious.

2. The Condition is arbitrary and capricious because it fails to differentiate between golf courses and lakes constructed within AMAs where water management regulations are in place and those located outside of AMAs.

Within regulated AMAs there are a number of water management regulations already in place to address water resource issues, however this is not true outside of AMAs. For this reason, there is a critical difference between the impact of groundwater use for golf courses, lakes and water features inside verses outside of AMAs. This difference is not recognized by the Condition.

First, as discussed above, because of state law AWS regulations within AMAs proposed uses of groundwater associated with subdivisions, such as golf course developments like those constructed by Robson Communities, mean that such groundwater use will be subject to management goal and replenishment requirements. Replenishment generally means that pumped groundwater will be replaced with artificial recharge of CAP water in the AMA, thus resulting in a net zero impact to the groundwater supplies within the AMA. However, outside

¹⁰ Although ADWR's AWS rules allow for replenishment obligations to be offset with "extinguishment credits" issued for the termination of irrigation groundwater rights, in this instance, there are no underlying irrigation rights associated with the Robson Ranch property. See, e.g., A.A.C. R-12-15-724 (providing for AWS credits issued by ADWR for extinguishment of irrigation rights). Therefore, there are no extinguishment credits available. Nevertheless, extinguishment credits which are intended to reward farming interests – the single largest users of groundwater supplies in the Pinal AMA for taking land out of cultivation – still have a generally positive impact on groundwater supplies.

1 of AMAs, like in portions of northern Arizona, where there are no AWS regulations and where
2 CAP water supplies are not available for on-going artificial recharge, groundwater inflows are
3 limited by natural precipitation rates. Thus, groundwater supplies in those areas can be
4 extremely vulnerable to the impacts of drought.

5 Additionally, within AMAs there are various water conservation requirements in place
6 to regulate water use on golf courses and lake features. For example, pursuant to ADWR's
7 municipal conservation program water provider's total water deliveries, including those to golf
8 courses, are subject to conservation requirements. *See* A.R.S. §§ 45-566, 45-566.01, and
9 45-566.02 (requiring ADWR to establish water conservation requirements); *see also*, TMP for
10 Pinal AMA, Chapter 5 (outlining the requirements of the Municipal Conservation Program).
11 Moreover, under ADWR's conservation program certain individual water users, such as turf-
12 related facilities, including golf courses, also have separate water conservation requirements and
13 turf watering restrictions. *See* TMP for Pinal AMA, Chapter 6, page 21 (outlining conservation
14 requirements for turf-related facilities in the Pinal AMA). Under the "Lakes Bill" statutes,
15 within AMAs lake facilities are limited by state law in the amount of groundwater that can be
16 used to fill and refill lakes. *See* A.R.S. § 45-131, *et seq.* Under the Lakes Bill, groundwater,
17 generally, can only be used for a short "interim" period until supplies of effluent are established
18 for the type of lakes associated with Robson Communities' residential developments. Robson
19 Ranch and the CC&N area of Picacho Water Company are located within the Pinal AMA;
20 therefore, all of the above water management regulations govern water use at the development
21 and any golf courses or lakes that may be constructed.

22 While the above water regulations are in place within AMAs, outside of AMAs there are
23 no such restrictions to assure water resource availability. Arguably, for this reason, concerns
24 regarding the impact of drought on groundwater supplies are more appropriately addressed in
25 the context of water supplies outside the scope of the AWS and AMA water goal regulations,
26 rather than water utilities operating within regulated AMAs.

27 The Condition does not acknowledge this regulatory difference between golf courses and
28 lakes inside of AMAs and those outside.

E. The Condition essentially imposes regulations on the same subject matter, groundwater use, already regulated under the state's Groundwater Code; therefore, there is no reasonable basis for the Commission when regulating water utilities to also regulate groundwater uses.

The Declaration of Policy set forth in A.R.S. §45-401 of the Arizona Groundwater Code provides:

A. The legislature finds that the people of Arizona are dependent in whole or in part upon groundwater basins for their water supply and that in many basins and sub-basins withdrawal of groundwater is greatly in excess of the safe annual yield and this is threatening to destroy the economy of certain areas of this state and is threatening to do substantial injury to the general economy and welfare of this state and its citizens. The legislature further finds that it is in the best interest of the general economy and welfare of this state and its citizens that the legislature evoke its police power to prescribe which uses of groundwater are most beneficial and economically effective.

B. It is therefore declared to be the public policy of this state that in the interest of protecting and stabilizing the general economy and welfare of this state and its citizens it is necessary to conserve, protect and allocate the use of groundwater resources of the state and to provide a framework for the comprehensive management and the regulation of the withdrawal, transportation, use, conservation and conveyance of rights to use the groundwater in this state.

(Emphasis added.)

Arguably, it may be possible under Arizona state law to have "concurrent jurisdiction" on the same subject matter rest with multiple branches of the government. *See, e.g., Arizona Eastern R.R. v. State*, 19 Ariz. 409, 171 P.906 (1918) (holding that the Commission's constitutionally based authority to regulate the number of cars in a train was permissive and did not deprive the legislature of its police power to regulate the same subject matter if the Commission had not acted). For example, water service and related matters can be regulated by the Commission pursuant to its authority to regulate water utilities granted under the Arizona Constitution. *See* Ariz. Const. Art. 15 § 3 (granting the Corporation Commission the power to "make reasonable rules, regulations and orders" to govern public service corporations). However, in Arizona, pursuant to its police powers, the legislature, also has the authority to regulate public resources, such as groundwater supplies, and has done so with the adoption of the Groundwater Code. *See* A.R.S. § 45-401 (declaring the legislatures policy in exercising its

1 police power to prescribe the uses of groundwater within the state).

2 Although potentially both the Commission and the legislature may have the power to
3 regulate the subject of groundwater uses, because the legislature has already acted in granting
4 the power to ADWR for the regulation of water management and groundwater resources within
5 AMAs, it is inappropriate for the Commission to now after-the-fact attempt to adopt conflicting
6 regulations for water utilities on the same subject matter.¹¹ See *Pacific Gas & Electric*
7 *Company v. State*, 23 Ariz. 81, 201 P. 632 (1921) (holding that when the Commission and the
8 legislature had the authority to cover the same regulatory ground, a subsequent law passed by
9 the legislature on a matter already covered by the Commission was void).

10 If the legislature had not already acted on the subject of regulating groundwater use
11 within AMAs, arguably, it may have been appropriate for the Commission to exercise its
12 regulatory authority for this purpose. However, as the Groundwater Code regulations are now
13 in place within AMAs, there is no reasonable basis for the Commission to also seek to regulate
14 this subject matter as well. In fact, any attempt to do so could rest in conflicting and contrary
15 legal regulations. For example, as discussed above, one of the potential consequences to the
16 Commission's Condition is a ban on the construction of golf course developments within
17 AMAs. This result is the direct consequence of the interplay between competing groundwater
18 regulations—those adopted by ADWR under the provisions of the Groundwater Code and the
19 new restrictions imposed by the Commission's proposed condition.

20 To avoid such conflicts in the law, the *Pacific Gas* court found that a subsequent
21 regulatory act by one branch of state government was invalid if another branch had
22 already acted as to the same subject matter. See *Pacific Gas*, 23 Ariz. at 86, 201 P. at
23 634. Similarly, it would be appropriate for the Commission to defer to the groundwater
24 management and regulations already within scope of ADWR's regulatory authority and
25 not seek to regulate the same subject matter with the adoption of the proposed condition
26 limiting groundwater uses.

27 ¹¹ The Condition on-its-face conflicts with the Groundwater Code which does not contain a "blanket"
28 prohibition of groundwater use for golf courses, lakes or other water features within AMAs.

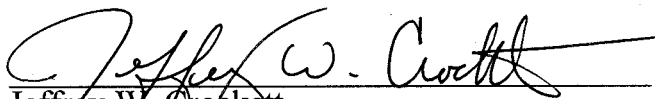
1 **III. CONCLUSION**

2 For the foregoing reasons, Picacho respectfully requests that the Commission
3 grant this Application for Rehearing and remove the Condition from the Decision. In the
4 alternative, Picacho Company requests that the Commission grant this Application and
5 remand the matter to the Hearing Division so the Company may present additional
6 evidence relating to the Condition. The Company requests that the Commission
7 consider this Application at its January 9, 2007 Open Meeting.

8 RESPECTFULLY SUBMITTED this 26th day of December, 2006.

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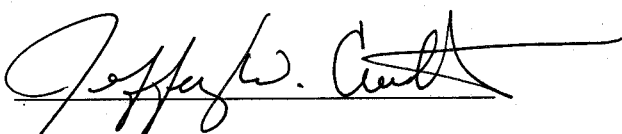
15 Original and 13 copies filed December 26,
16 2006 with Docket Control.

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